United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1730 BP/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., successor in interest of Committee to Stop Route 7, et al., :

Petitioners-Appellants, :

v. :

JOHN A. VOLPE, et al., :

Respondents-Appellees. :

- x

CIVIL APPEAL
DOCKET NO. 74-1730

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

HAYNES N. JOHNSON
Attorney for Petitioners
460 Summer Street
Stamford, Connecticut 06901
203-327-2650
212-635-1615

OF COUNSEL:

Alphonse R. Noë
460 Summer Street
Stamford, Connecticut 06901

Harvey D. Carter, Jr.
Elm Street
Bennington, Vermont 05201

4

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Preliminary Statement

On September 16, in a 2-to-1 decision, this Court, through Judges Mulligan and Pollack, affirmed per curiam a Connecticut District Court decision of Judge Newman holding that a Federal statute, the National Environmental Policy Act ("NEPA") 42 U.S.C. § 4321 was inapplicable to construction of a segment of an admittedly "major" and "significant" expressway (U.S. Route 7) north of Danbury, Connecticut, since only State funds are now to be used in its construction (Slip op. 5451).

The decision that the expressway was not a "federal action" was made even though the District Court had found (a) that the Route 7 expressway segment was part of a single planned expressway that had been partially constructed with 50% federal money, (b) that the southernmost mile of the segment cannot be used without travelling over a federally-funded bridge and expressway (i.e., no exit exists); (c) that federal planning money has already been spent on this segment; (d) that eligibility for federal funding had been maintained; and (e) that, after construction of another segment of Route 7 had been enjoined, the State had unsuccessfully sought an advisory opinion on NEPA avoidance if it used only State funds.

Prior to its decision of September 16, this Court had been one of those circuits which required compliance with NEPA to "the fullest extent possible". Monroe County v. Volpe, 472 F.2d 693, 699 (1972); Greene County v. FPC, 455 F.2d 416 (1972). Now, however, the Court has provided a leading case for NEPA avoidance: a State may so segment a

unitary project that Federal money is used only on those portions of projects "where compliance with NEPA will be less onerous" (Slip op. 5457), and State money may be used on those segments where the State wishes to avoid NEPA; and the NEPA decision does not have to be made until the last minute, not during planning. The law in the circuit has been changed with a *per curiam* opinion and in the face of a strong dissent.

For the foregoing reasons and others set forth below, petitioners now move for rehearing pursuant to Rule 40 FRAP and respectfully suggest that the matter be heard *en banc*, pursuant to Rule 35 FRAP, because (a) the majority opinion, if allowed to stand, would so severely limit the definition of "Federal action" as to all but eradicate the purposes underlying NEPA; (b) the majority opinion is inconsistent with *Monroe County*; (c) the majority opinion is inconsistent with *Conservation Society v. Secretary*, 362 F. Supp. 627 (D.Vt 1973), appeal pending (Dkt. 73-2629, argued September 18, 1974) as it relates to the planning of a three-State expressway; and (d) the decision will frustrate the Congressional purpose behind NEPA relating to planning and consideration of alternatives as set forth in *Monroe County*.*

Description of the Project

The facts are not in dispute, and were found for petitioners.

U. S. Route 7 starts at the Connecticut turnpike in Norwalk, Connecticut, and passes north through Danbury, Brookfield, New Milford,

---

*It will also frustrate the purpose of the Intergovernmental Cooperation Act. 42 U.S.C. § 4231.

and Canaan, thence in Massachusetts, (Great Barrington, Lenox, Pittsfield, Williamstown), and in Vermont (Bennington, Manchester, Rutland, Burlington).

A relocated Route 7 expressway, to be built in sections, is planned. In an earlier decision in this same case, the District Court found that the new Route 7 would be "a 31-mile, four-lane limited access expressway from Norwalk to New Milford, and perhaps eventually on to the Massachusetts line"; that the State "expects to use some $25,000,000 of its apportionment of federal funds on selected segments of the expressway"; and that federal construction money had already been used on other portions of the 31-mile Route 7 expressway *Committee to Stop Route 7 v. Volpe*, 346 F.Supp. 731, 733-4 (D. Conn. 1972)*.

In the present case, about four and a half miles of the Route 7 expressway are under construction between Danbury and Brookfield, and the State admits it plans to continue it at least to New Milford. The District Court found that the southernmost mile of this segment cannot be used unless one also drives on a federally-funded bridge and spur (Opin. 3-4, App. pp. 14-15) and the dissent agreed:

> "The fact is that one cannot use the southern portion of the segment in question without using a bridge and spur constructed with federal money" (Emphasis in original) (Slip op. 5458)

---

*In a subsequent decision, the Court refused to rule on whether an impact statement would be required for the Danbury to New Milford portions "if only State funds are used for construction" _F. Supp._, 4 ERC 1681, 2 ELR 20610 (D. Conn. 1972), which suggests that the State, after the first decision, had made a deliberate decision to avoid NEPA by segmenting financing.

Yet the District Court found that the new section of Route 7 was not a "federal action", because only State funds are to be used in its construction (Slip op. 5451), even though the Court also found that the construction "will provide additional reason for the construction of the [Federal] portion south of Danbury" (Opin. 13; App. 24). The effect of a finding that a segment becomes "Federal" only after construction money is committed is that any highway project can be segmented, by simple bookkeeping, and so avoid NEPA.

In a related case, Conservation Society v. Secretary, supra, Judge Oakes found that the proposed relocation of Route 7 as an expressway through Connecticut, Massachusetts, and Vermont was sufficiently an overall project involving federal action that he required an impact statement for the entire Route 7 corridor (362 F. Supp. at 638). Thus, the very same expressway that is a "federal action" to Judge Oakes is not a "federal action" to Judge Newman, nor, at present, to this Court.

The Decision by This Court

The majority opinion by this Court, Judges Mulligan and Pollack, affirmed per curiam a decision by Judge Newman, _F. Supp._, Civ. No. 15,054 (D. Conn. May 10, 1974), refusing to enjoin construction between Danbury and New Milford. The affirmance adopted the opinion below (Slip op. 5450) and said it was based upon lack of "federal" involvement and a determination that Judge Oakes' general findings as to the federal nature of Route 7 should not override Judge Newman's specific findings (Slip op. 5451).

Judge Winter of the Fourth Circuit wrote a long dissent, including the suggestion that resolution between this decision and what

may ultimately be decided in Conservation Society "may come about only after rehearing or rehearing en banc" (Slip op. 5454).

Judge Winter concluded that the expressway section in issue is subject to NEPA both "in its historical and physical context...and from considering the extent to which federal funds have been expended is the planning and construction of the segment and its continuation" (Slip op. 5454-5). He noted that Connecticut has followed all procedural steps, except compliance with NEPA, to maintain its eligibility for federal funds and its disavowal of such funds here "is no more then a bookkeeping entry shifting federal funds...to other portions of new Route 7 or to other projects where compliance with NEPA will be less onerous" (Slip op. 5457, also 5459). He found that no "clean physical break [was possible]...for the travelling public, between an existing federally-funded project and one to be built by State funds. A traveller on one must use the other" (Slip op. 5460). These findings were based upon the District Court opinion (App. 14).

Judge Winter also noted that the District Court had indicated that the cumulative effect of these various factors - maintaining eligibility for funding, use of federal planning money, and segmentation - made the determination of federal action a "close" question, and concluded that this characterization by itself "serves to decide the case", for NEPA must be satisfied "to the fullest extent possible", under the statute itself and Monroe County, supra (Slip op. 5461-2).

We submit that the questions raised by Judge Winter are of exceptional importance if NEPA is to have continued significance in this Circuit. Under the present decision, a state may segment a Federal-aid project at will and NEPA will have no effect at the important planning level. The Congressional mandate, "to the fullest extent possible",

will be meaningless.

POINT I

THE MAJORITY OPINION MISCONSTRUED AND MISAPPLIED THE NATIONAL ENVIRONMENTAL POLICY ACT AND, IF ALLOWED TO STAND, WOULD ALL BUT ERADICATE ITS BASIC PURPOSES

For NEPA to attach to projects, they must be "major Federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4322(c). Major action and significance are admitted here (App. 30), so the only issue is whether there is Federal involvement in this segment of the overall Route 7 project.

The time at which the project becomes "Federal" is important so that alternatives can be considered. Monroe County, supra, at 697-8. If that determination must await use of construction funds on the specific project, instead of being controlled by maintaining eligibility* for them, the value of NEPA as a planning tool is lost. Environmental impact statements will be too late and become a "hollow exercise". Calvert Cliffs v AEC, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

It is difficult to visualize a situation, short of actual construction funding, having more Federal involvement. Here, as found by the Court:

1) There is, to repeat, common use of a federal bridge and expressway, with no exits between State and federally founded portions. (Opin. 3-4; App. 14-15).

---

*All other Courts which have considered it have held that maintaining eligibility for funding creates a federal-state "partnership" which cannot thereafter be dissolved to avoid NEPA. La Raza Unida v. Volpe, 337 F. Supp. 221, 227 (ND Calif. 1971), affirmed 488 F.2d 559 (9th Cir. 1973); Indian Lookout Alliance v. Volpe, 489 F.2d 11,16 (8th Cir. 1973); Sierra Club v. Volpe, 351 F.Supp. 1002 (ND Calif.1972); James River v. Richmond 359 F.Supp. 611 (ED Va.1973), affirmed per curiam 481 F.2d 1280 (4th Cir. 1973). In the present case, the District Court, without contrary authority, refused to accept the "maintaining eligibility" rationale even though eligibility was maintained here. (Opin. 9; App. 20).

2) $50,000 Federal planning money was used on this particular segment. In fact, it was used, inter alia, to finance the public hearings held to maintain eligibility for construction financing. (Opin. 5; App. 16).

3) Federal money was used for construction on Route 7 north of Danbury, and was so found (Opin. 8; App. 19).

4) $40,000,000 of Federal construction money was used where Routes 7 and I-84 overlap in Danbury (Opin. 3; App. 14 et seq.).

5) Federal construction money was used for a mile of new Route 7 to connect with the Connecticut turnpike in Norwalk. Committee to Stop Route 7, supra, at p. 734.

6) The entire 31-mile stretch has been, and is being, planned by anticipating Federal funds of about $29.9 million for the overall construction. (Slip op. 5456; Appts' Br. p. 20) See also Judge Newman's earlier decision so holding. 346 F. Supp. at 734. Which segment actually receives the federal money is merely a bookkeeping matter (Opin. 9; App. 20; Stipulation, App. 31).

If, under these circumstances, NEPA can be avoided simply by not using Federal construction funds on a limited segment of the whole, NEPA has been separated from its Congressional purpose - "to the fullest possible extent".*

*Case after case has condemned segmentation. Sierra Club v. Volpe, supra; Named Individual Members v. Texas Highway Department, 446 F.2d 1012 (5th Cir. 1971). Thompson v. Fugate, 452 F.2d 57 (4th Cir. 1972); on remand 347 F.Supp. 120, 124 (E.D. Va. 1972); Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Ely v. Velde, _ F.2d_, 6 ERC 1553 (4th Cir. 1974); James River, supra.

The conclusion that only specific construction funding is "Federal action" reduces "Federal action" to just that. It would seem to no longer cover Federal grant of licenses and approvals, applications for permits, future planning, and the like. Cf. Greene County, supra, and Harlem Valley v. Stafford, _F. 2d _, 4 ELR 20632 (2d Cir. June 18, 1974). Otherwise, in the present case, the numerous acts of the FHWA, including granting location approvals, doing planning, paying for adjacent segment construction, etc., would constitute Federal involvement.

POINT 2

NEPA SHOULD BE APPLIED TO "THE FULLEST EXTENT POSSIBLE" WHERE MANY ACTIONS CREATE A CUMULATIVE EFFECT

The District Court raised the question of whether a finding of "Federal action" could be made based upon the "cumulative effect" of various factors, and said the question was "close" (Opin. 13; App. 24).

The cumulative factors cited were:

> "...the federal dollars to build the spur that will connect new Route 7 to I-84 and the small amount of highway planning and research funds, the 'route revision' approval by the FHWA and the State's continued eligibility for federal funding for later projects north of Danbury, and the relationship between the Danbury - New Milford portion and the Norwalk - Danbury portion..." (Opin. 13; App. 24).

The District Court might also have added the factors of cooperative planning (Appts' Br. p. 16), the totalizing of State and Federal funds so the entire Norwalk to New Milford section financing could be viewed as a whole (Appt's Br. p. 26), and the federally-funded bridge that

must be used when using the lower portion of the "state" funded portion of the expressway now before the Court.

The District Court then concluded that case law has developed no "standard" to measure such cumulative effects. Judge Winter disagreed.

"Cumulative effect" was held to determine "Federal action" in Civic Improvement Committee v. Volpe, _ F. Supp. _, 2 ELR 20170, 4 ERC 1160 (WDNC 1972), affirmed per curiam, 459 F. 2d 957 (4th Cir. 1972). The Court stated:

> "The court accepts the plaintiffs' theory that the effect of many federal decisions about a project or complex of projects can be individually limited but cumulatively considerable and that an environmental statement should be required if it is reasonable to anticipate a cumulatively significant impact on the environment from the federal action.
> "This theory, in fact, is part of the court's reason for believing that the Wendover problem is subject to the requirements of [NEPA]." (2 ERC et 20171).

This principle of cumulative effect was followed in James River, supra, 359 F. Supp. at 636.

As to "standards", Judge Winter set forth the best of these, "to the fullest extent possible". That statutory language, he said, "sets forth the rule for decision in close cases" (Slip op. 5461):

> "...In the immediate case, to give any effect to the policies of NEPA, much less to implement them to the 'fullest extent possible', it is necessary to interpret NEPA to cover a controversy presenting a close question of 'Federal' action." (Slip op. 5461).

Assuming, arguendo, that the question of "Federal action" is merely "close", the standard of NEPA requires a holding that the project

is "Federal". To hold otherwise would be inconsistent with the "fullest extent possible" ruling of Monroe County, supra, 472 F.2d at 699.

POINT 3

THE PRESENT DECISION IS INCONSISTENT WITH CONSERVATION SOCIETY IN THE APPLICATION OF NEPA

Conservation Society, supra, appellate decision pending, held that NEPA should apply at the earliest stage in the planning process, lest it be too late and a "hollow exercise", 362 F. Supp. at 637, since construction of one part of an expressway "coerces" construction of others. Judge Oakes required an impact statement for the entire corridor. As he put it:

> "The question becomes whether under NEPA ...an overall EIS may be required at any time, or whether particular segments of a highway may be constructed with an EIS required only as to those segments. The question is plainly one which goes right to the essence of the traditional federal-state planning process..." 362 F.Supp. at 636; emphasis supplied)

By contrast, the present decision of this Court permits impact statements to wait until a State seeks federal construction money for a particular segment. Consequently, the decision is inconsistent both with Conservation Society and with the NEPA planning requirements as set forth in the first Greene County decision.

There is also a clash between Conservation Society and the present case as to whether an impact statement is needed for longer length of expressway. The former says it is; the latter permits construction with no statement even though finding that at least 31 miles, if not more, is planned and that Federal money has been, and will be, used on portions.

CONCLUSION

If NEPA is to have any teeth in the Second Circuit, a rehearing, either by the same panel, or en banc, and a reversal are necessary.

Short of that there will be inconsistencies within the Circuit. One won't know at what stage planning under NEPA is required, and "Federal action" will be a meaningless term and an easily avoided requirement.

September 27, 1974

Respectfully submitted,

Haynes N. Johnson

Haynes N. Johnson
Attorney for Petitioners-Appellants
460 Summer Street
Stamford, Connecticut 06904
203-327-2650
212-635-1615

Of Counsel:
Alphonse R. Noë
Harvey D. Carter, Jr.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and is not filed for purpose of delay.

Haynes N. Johnson

Haynes N. Johnson
Attorney for Petitioners-Appellants

10-1

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CITIZENS FOR BALANCED ENVIRONMENT
AND TRANSPORTATION, INC., Successor
in interest of Committee to Stop
Route 7, et al.,

Plaintiffs-Appellants,

against

Civil Appeal
Docket No. 74-1730

JOHN A. VOLPE, et al.

Defendants-Appellees

PROOF OF SERVICE

The undersigned hereby certifies that he served two copies of Petition for Rehearing and Suggestion for Rehearing En Banc on Friday, September 27, 1974. Service was by first-class mail, postage prepaid, on Clement J. Kichuk, Assistant Attorney General, 90 Brainard Road, Hartford, Conn. 06114.

Respectfully,

Haynes N. Johnson

Haynes N. Johnson
Attorney for Petitioner-Appellants

460 Summer Street
Stamford, Connecticut 06901

Tel. 203 - 327-2650

cc: Clement J. Kichuk, Esquire

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
CLERK

PLEASE REFER TO THIS COURT'S DOCKET NUMBER IN ALL MATTERS

Date : 9-30-74

Title of Action: Citizens for Balanced Environment & Transportation Inc. v. John A.Volpe

Docket No. : 74-1730

Appellant's brief on petition for rehearing en banc

having been presented for filing this date, and acknowledgment of service not having been contained therein, a proof of service in the form of a statement of the date and manner of service and of the names of the person served is requested to be filed promptly. It is understood in accordance with Rule 25(d) of the Federal Rules of Appellate Procedure that such proof of service shall be filed not later than promptly. A letter of transmittal does not constitute proof of service. See Rule 25(d) F.R.A.P.

(Name of counsel) Haynes N. Johnson

By 460 Summer Street

(Firm name) Stamford,Conn. 06901

(Address)

(Telephone No.)

RECEIVED
OCT 3 1974